JKP Sdn Bhd v PPH Development (M) Sdn Bhd

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–188 OF 2003
KAMALANATHAN RATNAM J
11 JUNE 2003

Civil Procedure *— Injunction — Ex parte injunction — Setting aside — Suppression and non-disclosure of material facts by plaintiff when making ex parte application — Whether defendant had raised sufficient grounds to dissolve ex parte injunction on grounds of non-disclosure of material documents*

Civil Procedure *— Injunction — Injunction, application for — Inter partes hearing — Application by plaintiff for injunction to restrain defendant from interfering with resumption of housing project — Defendant continued with construction of project in reliance of plaintiff's assurances that it would pay amount owing to defendant — Whether plaintiff was estopped from contending that it was not obliged to pay defendant the sums due — Whether plaintiff would benefit from own breach if inter partes injunction granted*

Equity *— Equitable remedies and reliefs — Injunction — Inter partes hearing — Application by plaintiff for injunction to restrain defendant from interfering with resumption of housing project — Defendant continued with construction of project in reliance of plaintiff's assurances that it would pay amount owing to defendant — Whether plaintiff was estopped from contending that it was not obliged to pay defendant the sums due — Whether plaintiff would benefit from own breach if inter partes injunction granted — Whether equity should lend its hand in aid of inequity — Whether court should grant the inter partes injunction sought by the plaintiff*

The plaintiff, the registered proprietor of a piece of land appointed Fabina Development Sdn Bhd ('Fabina') to develop the said land. Fabina in turn appointed the defendant as the main contractor of the housing project pursuant to a construction contract. Clause 25(1) of the construction agreement provided that if the defendant shall commit a default under the agreement, the architect may give to the defendant a notice by registered post or by recorded delivery specifying the default. If the defendant were to continue such default for 14 days after receipt of such notice or repeat such default, Fabina may within ten days after such continuance or repetition forthwith determine the contract. The defendant had completed 90–95% of the said project but subsequently stopped further work on the basis that Fabina was not paying its dues on time. Fabina then terminated the construction contract. Prior to the termination of the construction agreement with the defendant, Fabina and the plaintiff had entered into a supplemental agreement wherein the plaintiff and Fabina acknowledged that as at 31 December 2000, the amount owed to the defendant by Fabina was RM4,388,537.47 and the plaintiff agreed to bear Fabina's liability to the defendant to the extent of RM4,000,000 by way of partial settlement of the defendant's outstanding and payable progressive claims. After the project had been abandoned, the Ministry of Finance directed Syarikat Perumahan Negara ('SPN') to

A rehabilitate this project. Fabina then redelivered possession of the project site to the plaintiff upon the request of SPN. The plaintiff alleged that when SPN's and the plaintiff's representatives visited the project site, they found the site to have been broken into, vandalized and its fixtures and fittings missing. The plaintiff thus moved the High Court on 28 March 2003 by way of an ex parte application in encl 2, B for inter alia: (a) an injunction to restrain the defendant by itself, or through its agents or any other persons from interfering or preventing directly or indirectly the resumption of the said housing project and from taking in or taking out anything from the project site; and (b) a declaration that the plaintiff be free, on its own or through a third party, to take over the project site and to rehabilitate and complete the C said project. The court allowed the plaintiff's ex parte application and fixed the hearing of the inter partes hearing to 16 April 2003. In the plaintiff's supporting affidavit for the ex parte application, it had exhibited its letter dated 24 March 2003 in which the plaintiff had set out its complaints regarding the dismantling and removal of the water D tank and the padlocking of the staircase by the defendant. In that letter, the plaintiff sought the defendant's confirmation as to whether those acts were done by the defendant or otherwise. In response, the defendant's solicitors wrote to the plaintiff on 25 March 2003, stating that suppliers and sub-contractors who had been promised payment by the plaintiff had gone onto the site to remove their goods on E account of the plaintiff's wilful and wrongful breach of its promise to pay them. The defendant's solicitors' letter of 25 March 2003 however was not exhibited by the plaintiff in its ex parte application. Meanwhile, the defendant had also filed an application in encl 6 to set aside the ex parte injunction.

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Held, allowing the defendant's application and dismissing the plaintiff's application:

(1) The plaintiff had suppressed material facts when making the ex parte application. The defendant's solicitors' letter of 25 March G 2003, which was a vital letter for the defendant, was not exhibited by the plaintiff in its application for the ex parte injunction. Another non-disclosure was the plaintiff's failure to exhibit the defendant's reply to Fabina's termination letter of 18 February 2002. In the defendant's reply, it refused to accept Fabina's unilateral termination and contended that Fabina's termination H was wrongful and invalid because it was the plaintiff who was in fundamental breach of the contract by failing to make the progress payments despite notices to do so (see p 199C, F–G).

(2) The right to terminate the construction agreement was governed by cl 25(l) thereof. The plaintiff had failed to exhibit, if indeed I there was such, a letter from the architect giving notice by registered post or by recorded delivery specifying the defendant's default. This letter from the architect was a pre-requisite

condition but this condition had not been shown to have been met (see pp 199I, 200D–E).

(3) The plaintiff had failed to exhibit the supplemental agreement entered into between the plaintiff and Fabina. Had the said supplementary agreement been exhibited, the plaintiff would have been compelled to refer to the clauses therein and to explain its way out. Since there was an acknowledged debt due to the defendant by the plaintiff itself, the defendant had raised sufficient grounds to dissolve the ex parte injunction on the grounds of non-disclosure of very material documents (see pp 200F, 201C).

(4) The plaintiff, by its assurances, conduct and overt acts, had assured the defendant that the sums owed to it would be paid for by the plaintiff. The defendant, in reliance of the plaintiff's assurances, conduct and actions had continued with the construction of the project, up to 90-95% whereby a sum of RM3,970,936.44 was due and owing to it, and which works had been duly certified by the architect. Hence, the plaintiff was estopped from contending that it was not obliged to pay the defendant the sums due and payable. If the inter partes injunction were granted, the plaintiff would benefit from its own wanton breach and equity would never lend its hand in such a situation (see pp 203D–F, 204E).

(5) Having weighed the evidence, the court was unable to conclude that the issue of the notice of termination would be resolved in favour of the plaintiff. In the circumstances, the High Court declined to grant the inter partes injunction sought by the plaintiff as the relief sought by the plaintiff could only be obtained in equity and equity would not lend its hand in aid of inequity (see p 204D–E).

(6) The issues of balance of convenience, special circumstances and damages being inadequate, need not be considered once the plaintiff had failed to clear the hurdle of disclosing that there was a bona fide serious question to be tried (see p 204G).

[Bahasa Malaysia summary

Plaintif, adalah tuanpunya berdaftar sekeping tanah dan telah melantik Fabina Development Sdn Bhd ('Fabina') untuk membangunkan tanah tersebut. Fabina kemudian telah melantik defendan sebagai kontraktor utama projek perumahan tersebut menurut satu kontrak pembinaan. Fasal 25(1) perjanjian pembinaan memperuntukkan bahawa jika defendan telah melakukan perlanggaran di bawah perjanjian tersebut, arkitek tersebut boleh memberikan defendan satu notis melalui pos berdaftar atau melalui hantaran berekod yang memperincikan perlanggaran tersebut. Jika defendan meneruskan kegagalan tersebut selama 14 hari selepas

menerima notis tersebut atau mengulangi perlanggaran tersebut, Fabina boleh dalam tempoh sepuluh hari selepas penerusan atau perbuatan semula tersebut menentukan kontrak tersebut. Defendan telah menyelesaikan 90–95% daripada projek tersebut tetapi kemudian telah menghentikan kerja-kerja seterusnya atas asas Fabina tidak membayar hutangnya mengikut masa. Fabina kemudian telah menamatkan kontrak pembinaan tersebut. Sebelum penamatan perjanjian pembinaan dengan defendan, Fabina dan plaintif telah memasuki satu perjanjian tambahan di mana plaintif dan Fabina mengetahui bahawa setakat 31 Disember 2000, jumlah yang perlu dibayar oleh Fabina adalah RM4,388,537.47 dan plaintif bersetuju untuk menanggung liabiliti Fabina terhadap defendan sehingga RM4,000,000 melalui penyelesaian ansuran tuntutan-tuntutan tertunggak dan perlu dibayar defendan. Selepas projek tersebut terbengkalai, Kementerian Kewangan telah mengarahkan Syarikat Perumahan Negara ('SPN') untuk memulihkan projek ini. Fabina kemudian telah menyerahsemula milikan tapak projek tersebut kepada plaintif atas permintaan SPN. Plaintif mengatakan bahawa apabila wakil-wakil SPN dan plaintif meninjau tapak projek tersebut, mereka mendapati tapak tersebut telah dipecah masuk, dirosakkan dan lekapan-lekapan dan kelengkapan-kelengkapannya hilang. Plaintif oleh itu telah memohon Mahkamah Tinggi pada 28 Mac 2003 melalui satu permohonan ex parte dalam lampiran 2, untuk antara lain: (a) satu injunksi untuk menyekat defendan dari dirinya, atau melalui ejen-ejennya atau sesiapa daripada mengganggu atau menghalang secara langsung atau tidak langsung untuk menyambung projek perumahan tersebut dan daripada membawa masuk dan membawa keluar apa-apa dari tapak projek tersebut; dan (b) satu deklarasi bahawa plaintif bebas, dengan sendiri atau melalui pihak ketiga, untuk mengambilalih tapak projek tersebut dan untuk memulih dan menyelesaikan projek tersebut. Mahkamah membenarkan permohonan ex parte plaintif dan menetapkan perbicaraan inter partes didengar pada 16 April 2003. Dalam afidavit sokongan plaintif untuk permohonan ex parte, ia telah mengekshibitkan surat bertarikh 24 Mac 2003 di mana plaintif telah menyatakan aduan-aduannya berhubung pembukaan dan pengalihan tangki air dan tangga yang dimangga oleh defendan. Dalam surat tersebut, plaintif memohon pengesahan defendan berhubung sama ada tindakan-tindakan yang dibuat oleh defendan atau sebaliknya. Sebagai jawapan, peguamcara defendan telah menulis kepada plaintif pada 25 Mac 2003, menyatakan bahawa pembekal-pembekal dan subkontraktor-subkontraktor yang telah menjanjikan bayaran oleh plaintif telah pergi ke tapak tersebut untuk mengalihkan barangan mereka disebabkan perlanggaran janji plaintif yang disengajakan dan salah untuk membayar mereka. Surat peguamcara defendan bertarikh 25 Mac 2003 walau bagaimanapun tidak diekshibitkan oleh plaintif dalam permohonan ex parte tersebut. Sementara itu, defendan juga telah memfailkan satu permohonan dalam lampiran 6 untuk mengenepikan injunksi ex parte tersebut.

Diputuskan, membenarkan permohonan defendan dan menolak permohonan plaintiff: A

(1) Plaintif telah menyekat fakta-fakta material apabila membuat permohonan ex parte. Surat peguamcara defendan bertarikh 25 Mac 2003, yang merupakan surat penting daripada defendan, tidak diekshibitkan oleh plaintif dalam permohonannya untuk B injunksi ex parte. Satu lagi ketidakdedahan adalah kegagalan plaintif untuk mengekshibitkan jawapan defendan kepada surat penamatan Fabina bertarikh 18 Februari 2002. Dalam jawapan defendan, ia enggan untuk menerima penamatan satu pihak Fabina dan menegaskan bahawa penamatan Fabina adalah salah dan tidak sah kerana ia adalah plaintif yang telah melanggar C kontrak tersebut kerana gagal untuk membuat bayaran ansuran meskipun notis-notis telah diberikan untuk berbuat demikian (lihat ms 199C, F–G).

(2) Hak untuk menamatkan perjanjian pembinaan dikawal oleh fasal 25(1). Plaintif telah gagal untuk mengekshibitkan, jika adapun, D surat daripada arkitek yang memberikan notis melalui pos berdaftar atau melalui serahan berekod yang memperincikan kegagalan defendan. Surat daripada arkitek ini adalah satu pra syarat tetapi syarat ini tidak ditunjukkan telah dipatuhi (lihat ms 199I, 200D–E).

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(3) Plaintif telah gagal untuk mengekshibitkan perjanjian tambahan yang dimasuki antara plaintif dan Fabina. Jika perjanjian tambahan telah diekshibitkan, plaintif akan terpaksa merujuk kepada fasal-fasal dalamnya dan perlu menjelaskan dirinya. Memandangkan terdapat pengetahuan tentang hutang yang perlu dibayar kepada defendan oleh plaintif sendiri, defendan telah F menimbulkan alasan-alasan yang mencukupi untuk membubarkan injunksi ex parte atas alasan ketidakdedahan dokumen-dokumen penting tersebut (lihat ms 200F, 201C).

(4) Plaintif, melalui jaminan-jaminan, perbuatan dan tindakan-tindakan terang-terangannya, telah memberikan jaminan kepada defendan bahawa jumlah-jumlah yang ia berhutang padanya akan G dibayar oleh plaintif. Defendan, yang bergantung kepada jaminan-jaminan, perbuatan-perbuatan dan tindakan-tindakan plaintif telah meneruskan projek pembinaan tersebut, sehingga 90–95% di mana sejumlah RM3,970,936.44 perlu dibayar dan berhutang padanya, dan kerja-kerja tersebut telahpun disahkan H oleh arkitek. Justeru itu, plaintif telah diestopkan daripada menegaskan bahawa ia tidak wajib untuk membayar defendan jumlah yang terhutang dan perlu dibayar. Sekiranya injunksi inter partes diberikan, plaintif akan mendapat manfaatnya daripada perlanggaran yang sewenang-wenangnya dan ekuiti tidak akan membantu dalam keadaan sebegini (lihat ms 203D–F, 204E). I

(5) Setelah menimbangkan keterangan tersebut, mahkamah tidak dapat membuat kesimpulan bahawa persoalan tentang notis

penamatan tersebut akan diputuskan berpihak kepada plaintif. Dalam keadaan ini Mahkamah Tinggi enggan memberikan injunksi inter partes yang dipohon oleh plaintif kerana relief yang dipohon oleh plaintif hanya boleh diperolehi dalam ekuiti dan ekuiti tidak akan membantu dalam suatu yang tidak berekuiti (lihat ms 204D–E).

(6) Persoalan tentang imbangan kemudahan, keadaan-keadaan istimewa dan ganti rugi yang tidak memadai, tidak perlu dipertimbangkan jika plaintif gagal untuk membuktikan bahawa terdapat satu persoalan bona fide yang serious yang perlu dibicarakan (lihat ms 204G).]

Notes

For cases on application for injunctions, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2611–2612.

For cases on ex parte injunctions, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2507–2543.

For cases on injunctions, equitable remedies and reliefs, see 6 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2352–2397.

Cases referred to

Hill v London Borough of Camden 18 BLR 31 (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

London Borough of Hounslow v Twickenham Garden Developments Ltd [1970] 3 All ER 326 (refd)

Royal Design Studio Pte Ltd v Chang Development Pte Ltd [1991] 2 MLJ 229 (refd)

Zarizana bte Abdul Aziz (*Jaishree Sadhwani* with her) (*K Ahmad & Yong*) for the plaintiff.

Dato' R Rajasingam (*R Rajasingam & Co*) for the defendant.

Kamalanathan Ratnam J: The original registered proprietor of the subject land was UDA Holdings Sdn Bhd which appointed Duniaga Sdn Bhd ('Duniaga') to develop the said land into a housing project known as Taman Sri Bayu consisting of low and medium cost flats. When construction was completed to about 15% of the project, Duniaga was unable to proceed further. The plaintiff, a wholly-owned subsidiary of the Minister of Finance Incorporated,, was appointed to service the project. For this purpose, the, plaintiff was then registered as the proprietor of the said land. The plaintiff then by way of a privatization agreement dated 10 September 1998 appointed Fabina Development Sdn Bhd ('Fabina') as the developer. By way of a construction agreement dated 19 July 2000, Fabina appointed the defendant as the main contractor of the said project. It is not in dispute that the defendant had completed 90–95% of the said project.

The defendant then stopped further work on the basis that Fabina was not paying its dues on time. Fabina then terminated the contract. Since the project was abandoned, the Ministry of Finance which was rehabilitating abandoned projects in the Country through an institution known as Syarikat Perumahan Negara ('SPN'), directed SPN to rehabilitate this project.

In the meantime, the defendant herein had commenced a Civil Suit No 22–85–02 against Fabina and the present plaintiff (as the owner of the land) for non-payment of the contract sums payable under the building contract and for unlawful termination of the contract for liquidated sums and for an injunction restraining Fabina from evicting the defendant from the project site. The defendant entered judgment against Fabina but the present plaintiff succeeded in striking out the defendant's statement of claim against it. The defendant has been granted leave to file the notice of appeal out of time.

Coming back to this case, Fabina then re-delivered possession of the project site to the plaintiff upon the request of SPN.

Plaintiff's case

It is the plaintiff's case that when SPN's representatives together with the plaintiff's representatives visited the project site they found the site to have been broken into, vandalized and its fixtures and fittings missing or having been removed. Further during a site inspection on 19 March 2003, the defendant's representative demanded that the plaintiff's and SPN's representatives leave the project site.

The ex parte application

The plaintiff thus moved this court on 28 March 2003 by way of an ex parte application (encl 2) supported by a certificate of urgency for the following orders:

(a) an injunction to restrain the defendant by itself, or through its agents, workers, contractors, sub-contractors, officers, directors or any other persons from interfering or preventing directly or indirectly the resumption of the said housing project, by whatever means;

(b) an injunction to restrain the defendant by itself or through its agents, workers, contractors, sub-contractors, officers, directors or any other persons from taking in or taking out anything from the project site either directly or indirectly, by whatever means;

(c) a declaration that the plaintiff be free, on its own or through a third party, to take over the project site and to rehabilitate and to complete the said project;

(d) that the plaintiff be free to obtain the help of the Police to put into effect and to enforce these orders;

(e) such further or other relief this Court deems fit and proper.

Cik Zarizana for the plaintiff informed the court that when the plaintiff's representatives visited the site they found that the defendant had placed

A security guards at the site. There were also workers at the site who were attempting to remove the water tanks on top of Block B of the project and some workers were welding grills to prevent access to the staircase.

On the ex parte application, I granted an order in terms of prayers (a), (b) and (c) and fixed the hearing of the inter partes to 16 April 2003.

B By then, the defendant had also filed an application, (encl 6) to set aside encl 2. By consent of parties, I heard encl 6 the next day.

Application to set aside the ex parte injunction

Enclosure 6 of the defendant was to set aside the ex parte injunction and for
C an order that the learned senior assistant registrar do hold an enquiry to assess damages and for costs.

The defendant contended that the plaintiff had suppressed material facts. The plaintiff had in its supporting affidavit 'for the ex parte application exhibited its letter dated 24 March 2003 in which the plaintiff
D had set out its complaints namely about the dismantling and removal of the water tank and the pad-locking of the staircase by the defendant. The plaintiff in that letter sought the defendant's confirmation as to whether the defendant did that or whether the defendant had instructed anyone else to do that. The defendant did respond by its solicitor's letter dated 25 March 2003 to this specific accusation. The defendant had said
E that it had come to understand that certain suppliers and sub-contractors who were directly promised by the plaintiff that they would be paid for their goods and services, had gone onto the site to remove their goods on account of the plaintiff's willful and wrongful breach of its promise to pay them. The defendant further said that on the defendant's advice the said suppliers and sub-contractors had agreed to hold their hand for the moment.

F The defendant further reiterated that it was not intimidated by threats of legal action as the defendant felt it had done nothing wrongful. It urged the plaintiff to do the rightful thing by paying the defendant its dues. Now this letter which indeed is a vital letter for the defendant was not exhibited by the plaintiff in its application for the ex parte injunction.

G Another non-disclosure was the plaintiff's failure to exhibit the defendant's reply to Fabina's letter dated 18 February 2002 terminating the agreement with the plaintiff. In that reply which the defendant had exhibited, the defendant had contended that Fabina's termination of the contract on the basis that the defendant had failed to proceed diligently to
H complete the works, was wrongful and invalid' in law and in fact, because it was the plaintiff who was in fundamental breach of the contract by failing to make the progress payments despite notices to do so. The defendant therefore refused to accept the unilateral termination of, the agreement by the plaintiff. The plaintiff had in its affidavit exhibited a demand letter from the defendant's solicitors and addressed to the plaintiff, demanding a sum
I of RM4,040,936.44.

The right to terminate the agreement is governed by cl 25(l) of the agreement which reads as follows:

> If the contractor shall make default in any one or more of the following respects, that is to say:
>
> (a) If he without reasonable cause wholly suspends the carrying out of the Works before completion thereof, or
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> (b) If he fails to proceed regularly and diligently with the Works, or
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> (c) If he refuses or persistently neglects to comply with a written notice from the Architect requiring him to remove defective work or improper materials or goods and by such refusal or neglect the Works are materially affected or
>
> (d) If he fails to comply with the provisions of cl 17 of these conditions.
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> then the Architect may give to him a notice by registered post or recorded delivery specifying the default, and if the Contractor either shall continue such default for fourteen days after receipt of such notice or shall at anytime thereafter repeat such default (whether previously repeated or not), then the Employer without prejudice to any other rights or remedies, may within ten days after such continuance or repetition by notice by registered post or recorded delivery forthwith determine the Employment of the Contractor under this Contract provided that such notice shall not be given unreasonably or vexatiously.

The plaintiff has failed to exhibit, if indeed there was such, a letter from the architect giving notice by registered post or by recorded delivery specifying the defendant's default. This letter from the architect is a pre-requisite. Only if the defendant fails to remedy the default identified by the architect within fourteen days can the plaintiff give notice of termination. The pre-requisite condition has not been shown to have been met. Since the defendant has already filed a suit in another court, I shall refrain from making any decision on the issue as to whether the termination was correct in law. It is for the court hearing Civil Suit No 22–85–02 to do so. Suffice it for me to hold that the defendant has raised sufficient grounds for me to dissolve the ex parte injunction granted.

The defendant also argued that the plaintiff had failed to exhibit the supplemental agreement entered into between the plaintiff and Fabina on 2 January 2001. This was done before Fabina terminated the agreement with the defendant on 18 February 2002. In the said supplemental agreement and under heading 'Developer's Representations and Warranties', both the plaintiff and Fabina acknowledged in cl 2(d), that as at 31 December 2000 the liabilities already incurred and as yet unsettled by the developer pertaining to the said project to the Main contractor, ie the defendant herein was RM4,388,537.47. It is pertinent to note that this sum which both the plaintiff and Fabina acknowledged as being due to the defendant is more than the sum of RM4,040,936.44 demanded by the defendant from the plaintiff.

The said supplemental agreement under heading 'Owner's New Obligations' reads as follows:

> The Owner hereby agrees covenants and undertakes with the Developer that:
>
> (a) The Owner shall bear the following liabilities as part of cost of and direct expenditure incurred in the Development by the Owner (hereinafter

A referred to as 'Direct Expenditure'), which sum shall be taken into account in the calculation of profits derived and generated from the Development:

(i) ...

(ii) a sum not exceeding the aggregate sum of Ringgit Malaysia Four Million (RM4,000,000) only or any further sum as the owner may at its sole discretion decide by way of partial settlement of the Main Contractor's outstanding and payable progressive claims exclusive of the sum of Ringgit Malaysia Three Million Four Hundred Thousand (RM3,400,000) only already advanced including the sums advanced vide Loan Agreement dated 27 November 1998 (hereinafter referred to as 'the Loan Agreement').

C Had the said supplementary agreement been exhibited, the plaintiff would have indeed been compelled to refer to the above clauses and to explain its way out. Since there is an acknowledged debt due to the defendant by the plaintiff itself, it is my judgment that the defendant has raised sufficient grounds to dissolve the said injunction on the grounds of non-disclosure of very material documents.

D

There is yet another important document that the plaintiff had failed to exhibit at the ex parte stage but which the plaintiff had exhibited at the inter partes stage. That document is the loan agreement entered into between the plaintiff, Fabina and the defendant on 27 November 1998. The gist of this agreement was that the plaintiff loaned Fabina a sum of RM1,606,115.44 E to enable Fabina to pay the defendant.

Since the plaintiff was unable to rebut the submission of the defendant I granted an order dissolving the ex parte injunction dated 28 March 2003 with costs and I further ordered damages to be assessed by the learned senior assistant registrar.

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The inter partes application

On 28 May 2003, the plaintiff proceeded with its inter partes application for an injunction.

The plaintiff argued that there is a serious question to be tried. It also G contended that damages are inadequate and that the balance of convenience lay in favour of granting the injunction since the resulting prejudice to the 730 purchasers, in the event the injunction is not granted, constituted public interest.

It is the plaintiff's case that since the contract has been terminated by the developer, the defendant must vacate the premises even if the defendant H claimed the termination to be wrongful. The plaintiff further argued that if the defendant was allowed to retain possession of the project site it would lead to a stalemate and to the ultimate abandonment of the project. The plaintiff argued that the defendant's remedy was in damages. The plaintiff relied on *Royal Design Studio Pte Ltd v Chang Development Pte Ltd* [1991] 2 I MLJ 229. The facts of the case were as follows.

By an agreement dated 11 July 1988 made between the plaintiff and the defendant, the plaintiff agreed at its own cost and expense to construct and

complete for the defendant, nine units of three-storey terrace houses, and in consideration therefore, the defendant agreed that on completion of the construction of the terrace houses, and upon issuance of the temporary occupation licence thereof, the defendant would convey to the plaintiff of three and a half units of the terrace houses. A

The court held that since the joint venture had been terminated, the plaintiff should not be permitted to remain in possession, of the site and that the defendant should be at liberty to engage other contractors to continue with the construction of the houses. It further held that even if the termination was wrongful, the plaintiff would still have to vacate the house and deliver possession thereof to the defendant. The plaintiff might proceed with its claim against the defendant for damages. The balance of convenience was in favour of a discharge of the injunction. B C

The plaintiff in this case argued that as it was entitled to possession of the project site the continued attempts by the defendant to interfere with the plaintiff's rights and to restrain the plaintiff and/or SPN from entering the project site and rehabilitating the same, constituted trespass and nuisance. The plaintiff also pointed to the defendant's actions in welding all staircase access and fixing wooden planks and zinc sheets to prevent the plaintiff from entering the buildings. The plaintiff also referred to a notice dated 14 March 2003 issued by the defendant prohibiting rehabilitation of the project. D

The plaintiff's case is that the balance of convenience lay in favour, of granting the injunction since at all times, the defendant's claim, whether in this action, or in Civil Suit No 22–85–02 is centered around the alleged wrongful termination of the building contract and non–payment of the contractual sum, allegedly owing under the contract with the developer. E

The plaintiff also emphasized that this is a case where the court's supervision of the contract is impossible and that therefore the balance of convenience lay in granting the injunction. The plaintiff urged the court to consider that the defendant does not obtain any benefit from occupying the project site or even by remaining on the job, whereas the plaintiff's interest is in securing completion of the project and delivering the flats to the purchasers. F G

It is the defendant's case that throughout its work on the project, Fabina was having cash flow problems and was unable to pay the defendant on time for the work done. It is also the defendant's case that the plaintiff had then stepped in and had assured the defendant of payments due to it and had thus induced the defendant to continue with the construction work which has not as yet been certified by the architect. A retention sum of RM1,446,980.23 is also being held back. It was because such large sums were owing, that the defendant was unable to diligently continue to work and thus demanded payment. The defendant contended that the plaintiff had resiled on its promise and had refused to pay. H

The defendant contended that the letter of termination dated 18 February 2002 from Fabina was a non-starter as it was not in compliance with cl 25 of the agreement. It is the defendant's case that in I

those circumstances the said construction agreement still subsisted and as such the defendant is lawfully in possession of the project site to the exclusion of all others. The defendant undertook to complete the project upon payment.

The defendant contended that when Fabina was unable to meet its payments to the defendant, the plaintiff had entered into a loan agreement on 27 November 1998 with Fabina and the defendant. The plaintiff had agreed to lend Fabina monies to enable payment of sums due and owing to the defendant whereby a sum of RM1,606,115.44 was paid to the defendant. The plaintiff funded the payment of RM1,606,115.44 to enable the defendant to continue with the project. Subsequent to the payment of RM1,606,115.44 the plaintiff again paid to the defendant a sum of RM3,940,169.29. This sum was money owing by Fabina and due under the Agreement which was paid directly by the plaintiff to the defendant. The plaintiff further entered into a supplemental agreement with Fabina dated 2 January 2001 whereby the plaintiff agreed to pay a sum of RM4,000,000 owing to the defendant. The plaintiff has failed to make any payment to the defendant under this agreement. The plaintiff further gave assurances to the defendant's suppliers that they would be paid; but this was also not done.

It is the finding of this court that the plaintiff, by its assurances, conduct and overt acts, had assured the defendant that the sums owed to it would be borne and paid for by the plaintiff. The defendant, in reliance of the plaintiff's assurances, conduct and actions had continued with the construction of the project, up to 90-95% whereby a sum of RM3,970,936.44 is due and owing to it, and which works have been duly certified by the architect.

I refer to a letter dated 20 March 2003 from Fabina to the plaintiff purportedly handing over the project site to the plaintiff and or to SPN. The question is, did Fabina have the right to hand over the site since the termination is being challenged as being wrongful. It is my judgment that if the injunction is granted the plaintiff will benefit from its own wanton breach and equity will never lend its hand in such a situation.

It is appropriate that I repeat the words of Ormrod LJ in *Hill v London Borough of Camden* 18 BLR 31 at p 45. It reads as follows:

> As I have said, the very essence of the provisions of the contract about payment on the architect's certificate was to maintain the cash flow of the contractors and when the cash flow is cut off without good reason — in my judgment, it was cut off without good reason in this case — it does not lie in the mouth of the employers to say that the plaintiffs were acting unreasonably or vexatiously. For these reasons, I would dismiss the appeal.

Since the plaintiff itself has undertaken by the supplemental agreement to make the payment, it is wrong for the plaintiff to refuse to honour its commitment. The defendant has undoubtedly supplied the materials and done the work and unless Fabina or the plaintiff have a good reason in law for not paying, the defendant ought, in my judgment to have been paid.

In *London Borough of Hounslow v Twickenham Garden Developments Ltd* [1970] 3 All ER 326, the Borough gave notice under Condition 25 (a

condition similar in effect to the cl 25 in this case) determining, the contractor's employment. The contractor wrote refusing to accept repudiation of the contract and elected to proceed with the work in accordance with the contract. The Borough then issued a writ claiming inter alia, damages for trespass and failure to vacate the site and an injunction to restrain the contractors from trespassing on the site. By notice of motion the Borough claimed an order restraining the contractors from entering, remaining or otherwise trespassing onto the site or from interfering in any way with the Borough's lawful possession of the site.

Megarry J (as he then was) in a well reasoned judgment held that if the Borough failed to establish the validity of the notices given by itself and the architect, the Borough was not entitled to the injunction sought. His Lordship further went on to hold that since the validity of the notices depended on disputed matters of fact ie whether or not the work had been regularly and diligently proceeded with, and before granting injunctions which would be partly mandatory in effect, the court must feel a high degree of assurance that the disputed matters would at the trial of the action be resolved in favour of the Borough and since the court felt no such assurances, the injunctions would not be granted.

Similarly in this case, this court having weighed the evidence is unable to conclude that the issue of the notice of termination would be resolved in favour of the plaintiff. In the circumstances, this court will decline to grant the injunction sought by the plaintiff. The relief which the plaintiff seeks can only be obtained in equity and equity will not lend its hand in aid of inequity.

It is my judgment that the plaintiff is estopped from contending that it is not obliged to pay the defendant the sums due and payable. The plaintiff by its conduct has clearly encouraged the defendant to continue with the works whereby the defendant has been put to loss. The plaintiff has now seemingly gained an advantage arising from its assurances and representation and the construction has been completed to 90–95%. The plaintiff is estopped from contending that there is no contract between it and the defendant to pay the cost of the construction.

The issue of balance of convenience, special circumstances and damages being inadequate, need not be considered once the plaintiff has failed to clear the hurdle of disclosing that there is a bona fide serious question to be tried. If there is no such serious question to be tried the relief asked should be refused (see *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193) .

Having considered all issues I hereby dismiss the application (encl 2) with costs.

Plaintiff's application discussed.

Reported by Lim Lee Na